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Case Comment

Evidence: the retention of fingerprints and samples following acquittal or when proceedings are discontinued

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Subject: Police. **Other related subjects:** Criminal evidence. Human rights

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Legislation: Police and Criminal Evidence Act 1984 s.64

Criminal Justice and Police Act 2001 s.82

European Convention on Human Rights 1950 art.8, art.14

Case: R. (on the application of S) v Chief Constable of South Yorkshire [2002] EWHC 478 (Admin); [2002] Po. L.R. 273 (DC)

*Cov. L.J. 35 Introduction and Background

The advent of DNA profiling and its development into an incredibly powerful forensic technique continues to raise both legal and moral issues. The Royal Commission on Criminal Justice[1] (RCCJ) recommended amending the law in order to facilitate the creation of a national DNA database. These recommendations were reflected in the provisions of the Criminal Justice and Public Order Act 1994,[2] which came into force in April 1995. These provisions amended the Police and Criminal Evidence Act 1984 (PACE) in order to enable samples suitable for DNA profiling to be taken without consent[3] and to increase significantly the offences for which such samples could be taken.[4] In addition to amending the law in relation to the classification and taking of samples the 1994 Act also amended s.64 PACE relating to the destruction of samples. These amendments did not significantly alter the provisions in relation to the destruction of samples but did clarify the law in relation to the retention of information derived from a sample. Both before and after the amendments, s.64 contained a requirement that samples be destroyed as soon as practical after an individual was acquitted of the offence,[5] or after a decision was taken not to prosecute.[6] However, following the amendments, there was a requirement that where samples were required to be destroyed information derived from the sample of any person entitled to its destruction should not be used in evidence against the person or for the purposes of any investigation of an offence[7] .

These provisions could be interpreted as an attempt to restore the position of the person charged but later acquitted, or against whom proceedings were dropped, to the same position as that of an individual who had not been charged in the first place. The sample would be destroyed and the information derived from it could not be used ***Cov. L.J. 36*** against that person in the future. This position is attractive in that if we truly believe in the principle that an individual is innocent until proven guilty why should they not be in the same position that they would have been had they not come into contact with the criminal justice system in the first place.

However, two high profile cases, *R v B; Attorney General's Reference No 3 of 1999*[8] and *R v Weir,*[9] indicated a problem with this approach. In both cases the individuals concerned were implicated in serious offences (rape and murder respectively) by information (DNA profiles) derived from samples that should have been destroyed following an acquittal and the dropping of proceedings for more minor offences. In *R v B* the defendant was identified as a suspect for an offence of rape following a match between a DNA profile obtained from a sample taken in respect of a burglary, of which the defendant had been acquitted, and a DNA profile obtained from a sample recovered from the rape victim. Following this initial

identification of the suspect a new sample was taken and the DNA profile compared with that from the rape victim. It was this match that was presented at court but the sample from the burglary, of which the defendant had been acquitted, had been used in the investigation contrary to s.64(3B)(b) of PACE. The trial judge ruled the DNA evidence inadmissible on the ground that s.64(3B)(b) provided that samples required to be destroyed under s.64 (1) 'shall not be used …for the purposes of any investigation of an offence' and directed an acquittal. On a subsequent reference by the Attorney General the Court of Appeal upheld the judge's ruling on admissibility, holding that s.64(3B) was mandatory. The House of Lords, reversing the decision of the Court of Appeal, held that a breach of s.64(3B) would not automatically render evidence inadmissible as a matter of law but would be a matter for the judge's discretion under s.78 PACE10 . This decision was in line with the approach taken towards improperly obtained evidence; it is not normally inadmissible as a matter of law but may be excluded as the judge's discretion.11 However, the fact remained that, despite very cogent forensic evidence, in *R v B* the defendant was acquitted of rape and in *Weir* a defendant initially convicted of murder had his conviction quashed on appeal.

The Attorney General's reference was heard by the House of Lords in December 2000 and in January 2001 the Home Secretary introduced amendments to the relevant sections of PACE in the House of Commons. These amendments became law in May 2001 when the Criminal Justice and Police Act 2001 gained Royal Assent. Section 82 of this Act amends s.64 PACE to permit the retention of fingerprints and samples from those subsequently acquitted or against whom proceedings are dropped. It provides that fingerprints or samples retained in these circumstances or the information derived from such samples may be used for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution. This is clearly a significant change in the law permitting, for example, a DNA profile from a sample taken in relation to an offence of which the defendant has ***Cov. L.J. 37*** been acquitted to be used in the investigation of subsequent offences. In addition, these changes have retrospective effect in that subsection (6) permits the retention and use of fingerprints and samples the destruction of which should have taken place before the commencement of s.82 and use of information from such samples12 .

Due to the far-reaching, and to some extent controversial, nature of these amendments it is perhaps not surprising that the issue has come before the courts.

The Facts

S v Chief Constable of South Yorkshire

In January 2001 S, a boy 12 years of age, had his fingerprints and samples for DNA profiling taken following his arrest and charge with attempted robbery. He had no previous convictions, cautions or warnings. On June 14 2001, he was acquitted of the offence. On July 18 2001, South Yorkshire Police wrote a letter to the solicitors acting on behalf of S, explaining that in accordance with s.64 PACE (as amended by the Criminal Justice and Police Act 2001) the fingerprints and samples would be retained. The letter specifically acknowledged that the fingerprints and samples taken would have been due for destruction but that the Criminal Justice and Police Act 2001 had amended the law. At the time S's fingerprints and samples were taken, in January 2001, s.64 PACE required the destruction of such evidence as soon as practicable after acquittal. By the time S had been acquitted the Criminal Justice and Police Act 2001 had come into force permitting their retention. On 24 July 2001, S's solicitors wrote requesting that his fingerprints and samples be destroyed. This was followed by a second letter, from S's solicitors to the Chief Constable of South Yorkshire, claiming that the retention constituted a breach of article 8 of the European Convention on Human Rights and that if the fingerprints and samples were not destroyed proceedings would be commenced for judicial review seeking a mandatory order for destruction and a declaration of incompatibility. A further letter was sent, by the solicitors, arguing that, even if the legislation were compatible with article 8, the Chief

Constable should consider the exercise of his discretion in each case and not adopt a blanket policy.

Marper v Chief Constable of South Yorkshire

On March 13 2001 Marper was arrested and charged with harassment of his partner and his fingerprints and DNA samples were taken. By the time of the pre-trial review, on May 3 2001, his partner had decided not to press the charge. On June 11 2001, the Crown Prosecution Service wrote to his solicitors enclosing a notice of discontinuance. On June 29 2001, Marper's solicitors wrote requesting destruction of the fingerprints and DNA samples. Having received the general letter from the Chief Constable of South Yorkshire indicating the change in s.64 and that fingerprints and samples would be retained, Marper's solicitors wrote again requesting that the Chief Constable exercise his discretion not to retain either the fingerprints or the samples. The Chief Constable replied confirming that, save in exceptional circumstances, it was policy to retain fingerprints and samples in all cases.

**Cov. L.J. 38* The Decision of the Divisional Court

The Divisional Court dismissed the claims by S and Marper for judicial review of the decision by the Chief Constable of South Yorkshire to retain their fingerprints and samples lawfully taken during the course of criminal investigations. Three principal issues arose before the Divisional Court: firstly, is the revised s.64 compatible with article 8; secondly, is it compatible with article 14; and thirdly, did the Chief Constable fetter his discretion.

Compatibility with Article 8

Counsel for the claimants submitted that the retention of fingerprints and samples constitutes an interference with a person's private life contrary to article 8(1) of the Convention.13 The Divisional Court accepted that the taking of fingerprints and samples for DNA profiling, both of which are capable of identifying individuals, could constitute an interference with an individual's privacy capable of engaging article 8. However, it was less convinced that the retention of fingerprints and samples, lawfully taken, could infringe such a right citing *McVeigh, O'Neill and Evans v United Kingdom*.14 The claimants relied on *Salonen v Finland,*15 in which the European Commission of Human Rights recognised that the choice of forenames fell within the sphere of private life as this constituted a means of identifying individuals, arguing that fingerprints and DNA samples identified individuals and represented a physical aspect of their persona. The Divisional Court was not convinced by this analogy and was reinforced in its view by the fact that in *Kinnunnen v Finland*16 the Commission did not consider retention of photographs and fingerprints for some years after acquittal of the applicant, to be a breach of article 8(1).

Though not certain that retention breached article 8(1) the Divisional Court went on to consider, assuming that there had been a breach of article 8(1), whether such an interference was ‘in accordance with the law’ and ‘necessary in a democratic society for the prevention of disorder or crime and for the protection of others’ as provided for by article 8(2). Counsel for the claimants argued that the retention was neither in accordance with the law nor necessary in a democratic society. The Court dismissed the first argument holding that the revised s.64 was neither uncertain nor lacking in clarity. With regard to whether the retention is necessary in a democratic society for the prevention of disorder or crime there were three issues: firstly, whether there is a need for restriction; secondly, whether the restriction corresponds to a pressing social need; and finally, whether the restriction is ‘proportionate’. The real issue in dispute was whether the restriction is proportionate. The claimants' case was that a fair balance had not been struck between protecting their right to respect for their private life and the interests of society in preventing, investigating and prosecuting criminal offences. It had not been demonstrated that the retention of fingerprints and samples ***Cov. L.J. 39*** from those with no previous convictions, acquitted or against whom proceedings were dropped was necessary. There was no evidence to suggest that it was necessary in respect of the two claimants. Counsel for the claimants submitted that they are presumed innocent of the charge and yet the retention creates the suspicion that they are not innocent. It was argued that there is a

difference between retaining fingerprints and samples where the police have grounds for investigation of a specific individual for a specific offence and retaining such information because it may potentially prove useful in future investigations.

The Divisional Court rejected this argument believing the claimants to be concentrating on the wrong issue. The court drew the distinction between compelling members of the public to provide fingerprints or samples, merely because the police would find them useful, and retaining fingerprints and samples lawfully obtained. The court felt that the protection for the individual lies in the legislative provisions detailing the circumstances in which the fingerprints and samples can be taken rather than their destruction. It highlighted the fact that the police are not required to destroy other evidence and intelligence gathered during an investigation, it is available for use in the future. The court concluded that the legislation relating to retention of fingerprints and samples is proportionate: the increase in serious crime is a pressing problem for society, fingerprints and DNA samples can provide powerful evidence against an individual, and interference is slight. The court thus rejected that the revised s.64 was incompatible with article 8.

Compatibility with Article 14

The claimants argued that s.64 was incompatible with article 14,17 submitting that the fact that an individual 'may' commit an offence in the future, in the same way that any person without previous convictions might, cannot be ground for allowing the police to retain personal information. Acquitted persons should be in the same position as those who have neither been convicted nor are under suspicion of having committed a crime. The court rejected this argument and found s.64 compatible with article 14. The court held that all those who have lawfully been obliged to provide fingerprints and samples for the police are treated equally whereas those who have never been required to provide fingerprints or samples are not in the same position. Should the court be incorrect in holding this view then it was satisfied that the retention of fingerprints and samples has a 'legitimate aim and objective and reasonable justification'.18

Had the Chief Constable Fettered his Discretion?

The court accepted that the Chief Constable clearly had a discretion whether or not to retain fingerprints and samples.19 It was informed that the policy of the Chief Constable of South Yorkshire had been to retain fingerprints and samples unless there ***Cov. L.J. 40*** was a convincing distinguishing feature to the case. The court was provided with examples of such features e.g. a case where, prior to the amendments coming into force, a specific term of an agreement to be bound over was that the fingerprints and samples would be destroyed. The claimants argued that the governing principle in the exercise of the discretion should be features related to the individual such as age or the type of offence for which he was arrested. The court felt that this argument was flawed as the fingerprints and samples are not being retained specifically because the person from whom they were obtained is suspected of committing an offence, hence personal characteristics are not relevant. The court held that it was appropriate to place the burden on the person seeking an exception to the general policy and that the Chief Constable, through examples given to the court, had demonstrated a willingness to consider any request not to retain data on its merit. The Chief Constable had not adopted a blanket policy and had not fettered his discretion. The court could see no grounds for challenging the approach taken by the Chief Constable to the exercise of his discretion, and no reason to conclude he erred in the exercise of his discretion in the two cases before the court.

The court recognised that the retention of fingerprints and samples by the police could arouse strong feelings and concerns. However, it felt that as a consequence of the Human Rights Act 1998 any extension of police powers could be challenged and tested against the provisions of the Convention. The court dismissed the applications, holding s.64(1A) to be compatible with the Convention and that there was no ground for striking down the discretion exercised by the Chief Constable in relation to retention of fingerprints and samples either generally or specifically in the cases before the court.

Commentary

The amendments to s.64 constitute a significant change in the law. Without doubt the larger the fingerprint and DNA databases the greater the chance that a fingerprint or sample from an unsolved crime will match an entry on the database and thus the greater the value of these databases in criminal investigations. However, this must be balanced by recognition of the great concern members of the public may have in having their fingerprints and samples retained on databases. Prior to the amendments the dividing line fell between those convicted of a recordable offence and those with no convictions, with the exception of individuals being investigated for criminal offences or awaiting trial. However, on acquittal or if proceedings were dropped, the fingerprints and samples of these individuals would be destroyed and if not destroyed could not be used for the investigation of offences or in evidence against them. The amendments have moved the dividing line, which now falls between those who have been investigated for an offence and those who have not. It is perhaps not surprising that those acquitted or against whom proceedings are dropped may feel aggrieved that they have not been returned to the position they were in before coming into contact with the criminal justice system. The amended provisions themselves show recognition of the unease members of the public may feel concerning the retention of fingerprints and samples in that they provide for fingerprints and samples taken from persons not suspected of having committed the offence to be destroyed. This provision is designed to encourage members of the public to assist in the investigation of offences; for example where the police wish to undertake a mass screen and ask all the inhabitants of a particular geographical area to submit to the taking of samples for ***Cov. L.J. 41*** elimination purposes s.64(3)20 provides for their fingerprints and samples to be destroyed.

Having recognised there is concern amongst the public at such retention, it is necessary to consider whether the concern is reasonable and whether despite that concern the government should have expanded the law. In the retention of fingerprints and samples the material retained is very specific and is not open to meaningful publication, it is used by specialists in the investigation of offences. The concern by members of the public may be due to a misunderstanding of the nature of the material held; for example at present the DNA profile held does not provide personal information on an individual, so it could not be used by an insurance company to investigate potential genetic predisposition to disease. A clear explanation of the nature of the material held could alleviate this concern. Alternatively, concern could centre around the potential for future use to match against material taken from the scene of a crime. It is possible to argue that a law-abiding citizen has nothing to fear from retention of their samples. Finally, a person who has not been convicted of an offence may simply object to personal information being retained.

With regard to this final argument the Divisional Court felt that there was little if any ground for holding that article 8(1) was engaged, in that it felt the invasion of privacy occurs at the time the sample is taken, the protection for the individual being the legislation governing the taking of samples, and not through the retention of samples. Although the Court was not required to decide this issue, relying on article 8(2) to justify any infringement, there are significant ramifications to a decision that retention does not engage article 8 at all. Within days of birth all babies in the UK have a heel prick test to remove a small sample of blood in order to screen for a genetic enzyme deficiency. If the taking of this sample is the infringement of privacy, and the retention of the sample and the information derived from it is not, it would only be a small step to argue that analysis for other purposes, such as placing a DNA profile on a database, is not an infringement of privacy. The Criminal Justice and Police Act 2001 took us a step closer to a mass database for all citizens; to deem the retention not an infringement of privacy would take us even closer.

As stated above the court did not have to determine whether article 8(1) was engaged but, assuming it was, felt that it was justified under article 8(2). The retention would clearly appear to be in accordance with the law, the key issue is whether it is necessary and proportionate. The court presented logical arguments that this is the case, believing that infringement, if it exists at all, in respect of retention is relatively slight given the real public concern that sexual and violent crime generates. The court also highlighted the fact that

the police are not required to destroy the vast amount of evidence collected during the investigation of an offence, such as witness statements. However, it does not give recognition to the fact that fingerprints and DNA profiles are inherently very personal information. The court was relatively dismissive of the argument that an individual who is acquitted or against whom proceedings are ***Cov. L.J. 42** dropped has a right to be returned to the position they were in prior to their encounter with the criminal justice system. Considering the strength of feeling that retention of samples can generate this was not given sufficient weighting. Expansion of the fingerprint and DNA databases has great potential for detection of crime. However, as stated above, it is a very small step from the stance taken by the Divisional Court to the placing of all persons on the DNA database. Risk of crime is part of a free society; greater monitoring of individuals can reduce the potential for crime and enhance detection; the difficulty is deciding where we draw the line.

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1.
The Royal Commission on Criminal Justice (July 1993) Cm 2263, HMSO.

2.
Sections 54-58

3.
This was achieved by reclassifying saliva and mouth swabs as non-intimate samples.

4.
This was achieved in two ways: firstly, by amending the offences for which non-intimate samples could be taken without consent from serious arrestable to recordable offences (going further than the recommendations of the RCCJ); and secondly, by extending the circumstances in which such samples could be taken to include persons charged with or informed they will be reported for a recordable offence and from persons convicted of a recordable offence. For further details of these amendments see Steventon.B.V, 'Creating a DNA Database' (1995) Journal of Criminal Law 59(4), p411.

5.
Section 64(1)

6.
Section 64(2)

7.
Section 64(3B)

8.
[2001] 1 All ER 577

9.
[2001] Crim LR 656

10.
s78 (1) 'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it.'

11.
For further detail of this case see Farrar S 'DNA Evidence and Human Rights' (2001) Cov Law J 6(1), page 64.

12.
This could relate to a significant number of samples. *The Guardian,* September 1, 2000

reported that 50,000 samples that should have been destroyed were still in existence.

13.

‘Everyone has the right to respect for his private and family life, his home and his correspondence.’

14.

(1981) 25 DR 15 in which the European Commission of Human Rights expressly distinguished between the taking of fingerprints, photographs and samples and their retention, stating that it was open to question whether such retention was an interference with article 8(1).

15.

Application No 27868/95.

16.

Application 24950/94.

17.

‘The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status’.

18.

Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471.

19.

Section 64 1(A) ‘… the fingerprints or samples *may* be retained after they have fulfilled the purposes for which they were taken…’

20.

Section 64(3) of the act provides that ifa) fingerprints or samples are taken from a person in connection with the investigation of an offence; andb) that person is not suspected of having committed the offence, they must, except as provided in the following provisions of this section, be destroyed as soon as they have fulfilled the purpose for which they were taken.

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